No. 14,109

IN THE

United States Court of Appeals
For the Ninth Circuit

LOUIS E. WOLCHER, *Appellant,*	
vs.	
UNITED STATES OF AMERICA, *Appellee.*	

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Louis E. Wolcher was accused by an indictment with violating Sec. 145(b) of the Internal Revenue Code (26 U.S.C. 145b). The indictment charged in substance (R. 3) that Louis E. Wolcher on or about October 15, 1944, did attempt to defeat and evade a large part of the income and victory tax due and owing by him, by filing a false and fraudulent tax return for the fiscal year ending June 30, 1944.[1]

The cause was tried before a jury. At the conclusion of all the evidence in the case appellant moved for a judgment of acquittal, which motion was denied

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[1]This is the second appeal. There was a prior trial and appeal and this Court reversed with directions for a re-trial. *Wolcher v. United States,* 200 F. (2d) 493.

(R. 6). The jury returned a verdict finding defendant guilty (R. 6). A motion for a new trial was denied (R. 17).

The Court sentenced appellant to two years imprisonment, to pay a fine of $10,000 plus costs of prosecution (R. 17).

From said judgment and sentence appellant prosecutes this appeal.

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the District Court.

18 U.S.C. § 3231, provides that

> "The district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States."

2. Jurisdiction of this Court upon appeal.

28 U.S.C. § 1291, reads:

> "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

28 U.S.C. § 1294 reads in part:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the court of appeals as follows: (1) from a district court of the United States to the court of appeals for the circuit embracing the district, * * *"

3. The pleadings showing the existence of jurisdiction.

(a) The indictment (R. 3); (b) Plea of Not Guilty (R. 5); (c) Notice of appeal (R. 20).

4. Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgment in question.

These facts are set forth in the prior portion of this brief and will be stated more fully in the following abstract of the case.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The substance of the indictment has already been set forth.

(a) The sole question of fact involved.

In October, 1944, appellant filed his individual tax return for the fiscal year ending June 30, 1944. No question was raised, except as hereinafter stated, but what said return in all particulars was true and correct.

The Government contended that during said year appellant engaged in transactions involving the purchase of whiskey which he sold over the ceiling price established by the OPA and failed to report the profit made from such sales.

Appellant freely admitted such whiskey transactions, but contended that he made no profit therefrom as he, in turn, had to pay a substantial bonus to procure the whiskey; that he owned or was interested in several taverns selling whiskey at retail by the glass and that sales to outsiders were made

over the ceiling price solely for the purpose of equalizing the bonus he had to pay for procuring the whiskey used in his own taverns.

(b) The business operations of appellant.

Appellant was the owner and operator of the "The Advance Automatic Sales Company" engaged in the wholesale sale of coin operated machines such as candy, peanut, cigarette vending machines, pinball machines, coin operated phonographs such as are used in places of public amusement and taverns; that in 1943 this business had about 1000 customers and was not confined to the State of California (R. 345-6).

Appellant *was not* engaged in the wholesale liquor business or in the business of buying and selling whiskey by the case or carload.

During the year 1943 appellant was identified with certain partnerships, namely: Bay Building Co., California Contract Co., Exhibit Furniture Co., Fun Center Arcade, Gold Coast, Happyland Arcade, Playhouse Arcade, Purety Sweets, The Showboat and Silver Rail (R. 346); appellant individually owned places known as Caruso's, Funland Arcade and the Sacramento Arcade (R. 346).

The Silver Rail, The Gold Coast and The Showboat were taverns engaged in selling liquor by the glass (R. 346).

During said year certain members of appellant's family were engaged in selling liquor by the glass in

places known as Tommy's Joint, Valencia Tavern and the Victory Bar (R. 346-7).

Appellant testified that of the whiskey he purchased during said year, the portions that went to the places with which he was connected or which his relatives operated went to such places at the ceiling price and the portions that went to strangers was sold over the ceiling price (R. 365).

(c) The status of the whiskey market.

During the year involved it was almost impossible for either wholesalers or tavern owners to get whiskey.

The Government called representatives from three wholesale houses who testified as follows:

James Oligny of the George Barton Company testified that it was impossible to get whiskey and that they could not get enough to keep in business (R. 109). Samuel Weiss of the Franciscan Distributing Co. testified that the larger distillers were decreasing the allotments to such an extent that "we were unable to carry on our business" (R. 140). Vance Hammerly of Rathjen Bros. testified they were not receiving sufficient whiskey from the distillers to supply their customers and they had to put their customers on an allotment basis based on the "amount of previous purchases an account might buy, in order to be fair with the allotment of the whiskey we had for sale" (R. 311).

The Government called as witnesses 13 tavern owners who had purchased some of the whiskey involved

over the OPA price.[2] The sum and substance of their testimony was that they had to get whiskey to keep in business, that whiskey was scarce and hard to get, that without whiskey they would not do any business, that they had to buy package deals to get whiskey, etc. (R. 165, 171, 176, 180, 190, 200, 209, 216, 228, 251, 260, 267).

(d) Evidence relating to the 7 whiskey transactions.

The items in issue relate to seven purchases and sales of whiskey. One from Rathjen Bros. of San Francisco. Four shipments from the East that came through the wholesale and distributing firm of Franciscan Distributing Company, and two eastern shipments that came through the firm of George Barton, both being San Francisco firms.

Of the fourteen tavern owners called by the Government twelve purchased their whiskey through Roy Clemmens, John Kirby or Peter Norman. Each of these men operated so-called "routes" in that they placed coin operated machines in various taverns throughout the San Francisco bay area (R. 195, 269, 278) and in turn purchased their equipment from Wolcher. The tavern owners when unable to get whiskey to operate their bars contacted these men and sought to have them procure whiskey for their bars.[3]

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[2]Fred Rocci, Herman Schmidt, Wm. Ackerman, Jack Tardiff, Peter Norman, Don Castle, Pete Caglia, Angelo Lombardo, Samuel Fuentes, John Griffith, John Hafford, Geo. Morris and Jos. Gando.

[3]Wolcher, on cross-examination, testified to several places that procured liquor from the shipments and that he believed he let them have the liquor at the ceiling price (R. 428, 429, 430); however for the purposes of this brief we will assume that all whiskey that went to the places Wolcher or his relatives were not interested in were sold over the ceiling price.

The *modus operandi* in all instances was the same; the tavern owner paid the ceiling price by check and the overage in cash. The cash was paid to Wolcher eventually, the checks went to the wholesale distributing houses.[4]

The Old Brook Whiskey transaction.

This involved the sale of 500 cases of Old Brook Whiskey from Rathjen Bros. to the "Gold Coast" on May 11, 1943, for $25,950 (R. 46).

Vance Hammerly, called by the Government, testified: I am auditor and treasurer of Rathjen Bros. (R. 46); that during 1943 Raymond Worthy, salesman for Rathjen Bros., handled the accounts for the Gold Coast and Silver Rail (two taverns owned by Wolcher) (R. 311); that the sheets (Def's Exhibits C and D) are the ledger accounts of Rathjen's with the Gold Coast and Silver Rail for 1943 (R. 308-9); each of the ledger accounts are marked C.O.D. (R. 312-314); the Gold Coast Ledger sheet shows the sale of 500 cases Old Brook whiskey under date of May 11, 1943, for $29,500; this amount was paid off in four payments, viz: $5,000 on May 14, 1943, $1500 on May 19, $15,000 on May 25 and $4450 on May 28 (R. 315); that there were only 1,000 cases in the Old Brook shipment received by Rathjens (R. 315) of which 500 went to the Gold Coast.[5]

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[4]Except the whiskey from Rathjen Bros. hereafter discussed.

[5]The ledger sheets show that for months before and after the sale to the Gold Coast of the 500 cases for $29,500 that the largest sale for any month, under the allotment system, to either the Gold Coast or Silver Rail never exceeded, in round numbers, $600.

Xavier Grusenmeyer, called by the Government, testified: In 1943 I supervised the books and the cash and made the deposits for the Gold Coast and Silver Rail (R. 52-55); the Old Brook Whiskey cost, including tax $51.90 a case (R. 59); somewhere between 300 and 350 cases were sold (R. 59) at $72 per case (R. 62); I received the money for the sales of which $51.90 per case was deposited in the bank and the balance put into the safe on Wolcher's instructions (R. 62); it was customary to keep large sums of cash in the safe as we had to pay over-ceilings once in a while for different stuff (R. 66) and there was a check cashing stand in the place (R. 67); in effect Mr. Wolcher told me that the difference between the invoice price and the selling price was because he had to pay money over the ceiling price for the whiskey (R. 68).

Jack V. Kent, called by defendant, testified: in 1943 I managed the Gold Coast Cafe; in May I knew Raymond Worthy he was a salesman for Rathjen Bros. (R. 335-6); he called at regular intervals; in May he came in and I asked him if he could help us out with additional stock, he said there was a particular buy on a new brand of bonded whiskey and there was 500 cases available if we could meet the requirements that there would have to be an additional price, under the table price, paid to get the whiskey; I told him that probably Mr. Wolcher would be interested and that I would put him in touch with Mr. Wolcher (R. 336); I don't recall the exact amount but I believe it was $20 a case over the list

or ceiling price (R. 337); the whiskey was Old Brook (R. 343).

Louis E. Wolcher, testified as a witness in his own behalf: In 1943 it was extremely difficult to get whiskey for my taverns (R. 347); in May of 1943 there was a purchase of 500 cases of Old Brook Whiskey from Rathjen Bros. for $25,950; Mr. Kent, manager of the Gold Coast, told me of his efforts to procure whiskey and that he had heard from Ray Worthy, the salesman for Rathjen Bros., that we could get 500 cases of bonded whiskey (R. 348); I met Mr. Worthy and he told me I could get 500 cases of Old Brook for $51 something a case but in order to buy it it would take $20 a case under the table; that is $20 a case over the Rathjen price, I said I would take it; I gave Worthy $10,000 in cash which I got out of the safe in the Silver Rail (R. 349); it is correct that some of that whiskey was sold for around $72 a case and the differential between $51.90 and $72 a case went into the safe where the overage came out of in the first place (R. 350) the first sale to outsiders of this Old Brook whiskey took place 5 or 6 months after its purchase (R. 351).

The four whiskey transactions handled through the Franciscan Distributing Company.

Four shipments of whiskey from the east were handled through the Franciscan Distributing Co. at a cost to Wolcher (without adding any bonus or over-ceiling price) as follows: 100 cases Supreme Bourbon at $33.35 per case ($3,335); 500 cases Schen-

ley Royal Reserve at $38.23 per case ($19,115); 500 cases Golden Wedding Rye at $34.50 per case ($17,-250); 500 pints and 500 fifths of Gallagher & Burton at $37.80 and $30.50 per case ($34,150).

Samuel S. Weiss, of the Franciscan Distributing Co., called by the Government, first identified certain books and records of the Franciscan Co. (R. 113-118), then testified as follows:

In 1943 Mr. Wolcher had a few saloons that we supplied with our regular liquor; Mr. Wolcher asked if we could supply him with more whiskey and I told him it was impossible and that if he wanted more whiskey he would have to go and get it and we would be only to glad to import it for him at approximately $2 a case (R. 122-3); Wolcher said he could make a few connections in the east and if he did he would let us know and we would import it for him (R. 140); he said something about connections in the east with people who were also in the same business as he is who had some liquor connections (R. 141);

We handled four shipments of liquor from the east for Wolcher, 500 cases Royal Reserve, 500 cases Golden Wedding Rye, 1000 cases Gallagher & Burton, 100 cases Supreme Bourbon (R. 141-2); Neither I nor my firm had anything to do with placing the orders in the east for these shipments, we had nothing to do with the negotiations that led up to these shipments coming from the east (R. 142); eventually Mr. Wolcher told us of some arrangements that had been made in the east and that our firm would re-

ceive word from various distilleries in the east as to the shipments; our firm received some invoice or bill of lading from the shippers (R. 143); the liquor was distributed at the direction of Mr. Wolcher (R. 123, 125).

Of the 500 Schenley Royal Reserve we delivered 125 cases to the "Showboat" (R. 128) and 15 cases to the "Victory Cafe" (R. 128).[6]

Of the 500 cases Golden Wedding Rye we delivered 50 cases to the "Showboat" (R. 131);[7]

(The witness' enumeration shows none of the 1000 cases of Gallagher & Burton went to any tavern in which appellant was interested [R. 131]).[8]

The two whiskey transactions handled through George Barton Company.

Two shipments of whiskey from the east were handled through the George Barton Company at a cost to Wolcher (without adding any bonus or over-ceiling price) as follows: 500 cases Gallagher & Burton at $30.50 per case ($15,250) and 2038 cases Old Mr. Boston Rockingchair Whiskey at $26.92 per case ($54,862.96).

James A. Oligny, called by the Government, testified:

In 1943 I was office and credit manager for George Barton engaged in the wholesale liquor business (R. 94); I did not meet Louis Wolcher until the latter

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[6]The Showboat and Victory were taverns in which Wolcher was interested. This whiskey was sold to outsiders at $60 per case.

[7]Golden Wedding Rye sold to outsiders at $60 per case.

[8]Entire 1000 cases sold to outsiders at $60 per case.

part of December, 1943, (R. 95); that is a sight draft that was attached to a bill of lading covering the shipment of 2,038 cases Boston Rockingchair whiskey at the invoice price of $40,230.12 from the Penn-Midland Import Corporation and our check for the same amount (Plaintiff's Ex. 5) (R. 95); the invoice is dated Dec. 3, 1943 and our check Dec. 22, 1943 (R. 97); the George Barton Co. did not pay any amount for that liquor over the amount shown on the invoice (R. 96); (documents identified by witness as invoices for the sale to bars of the 2,038 cases—Plaintiff's Ex. 6) we did not receive any of the money for the sale of this whiskey from any of the purchasers, we received the money from Cy Owens (R. 100); the George Barton Co. received $26.92 per case for the whiskey, the price we were entitled to sell it for under the OPA (R. 101); the profit on the transaction was divided three ways, Wolcher and Owens each received a check for $3,000 less security and federal income taxes (R. 101).

Neither the George Barton Co. or anyone connected with the company had anything to do with procuring this whiskey from the east, we did not place the order, the only contact we had was with Cy Owens who told us the whiskey would be coming from the east (R. 103-4); and the same is true of the first shipment we handled—500 cases of Gallagher & Burton (R. 105).[9]

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[9]The Gallagher & Burton transaction was developed by the defense on cross-examination of Mr. Oligny, although this transaction had been developed at the first trial of the case.

At the last trial of this case I identified the document you show me as one showing the places of distribution and ceiling price per case of the 500 cases of Gallagher & Burton whiskey (admitted as Defendant's Ex. B) (R. 107-8).

We had no control over the persons to whom the shipments of this liquor were made, our agreement with Cy Owens was that we were to distribute the whiskey at his direction (R. 109).

(Plaintiff's Ex. 6 shows that of the 2,038 cases of Mr. Boston Rockingchair Whiskey the following number were delivered to places that Wolcher owned or had an interest in: Gold Coast—100 cases, Silver Rail—100 cases, Show Boat—175 cases, Victory Bar —50 cases, Tommy's Joint—100 cases, Total 525 cases).[10]

(Defendant's Ex. B shows that of the 500 cases of Gallagher & Burton the following number were delivered to places owned by Wolcher or in which he had an interest: Victory Club—100 cases, Tommy's Joint —36 cases. Total 136 cases).[11]

Cy Owens, called by the Government, testified:

I have known Wolcher for 11 or 12 years, I have no present business association with him now (R. 72); in 1943 I owned two taverns in conjunction with Wolcher's 2 nephews—Daniel and Harold Leventhal

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[10]The Old Mr. Boston whiskey was sold to outsiders at $60 per case.

[11]The Gallagher & Burton whiskey was sold to outsiders at $60 per case.

—they were Tommy's Joint and the Victory Bar (R. 73); I recall a transaction involving the Mr. Boston Rockingchair whiskey, it came from the Penn-Midland Co. in the east (R. 74); whiskey was hard to get and Mr. Wolcher said he had a friend that said he could get quite a bit of whiskey (R. 75); I had something to do with the whiskey coming to the George Barton Co., (R. 75); I had been in the liquor importing business and had done business with George Barton Co. years previous (R. 76); neither George Barton nor I had any interest in the liquor that was imported (R. 76); as to the Old Mr. Boston liquor there was no fee charged by Barton, we worked it out to divide the profit 3 ways (R. 77); the profit was around $9,000 and was the difference between the cost of the liquor, freight, etc. and the profit the OPA allowed us to sell it at (R. 78); I received Barton's invoice price of the liquor from Mr. Wolcher at his office for the Barton Co., I know nothing about any over-ceiling selling of this liquor (R. 80); the $9,000 profit (divided 3 ways) did not involve the division of any overage or over-ceiling price that anybody paid for the whiskey (R. 83);

Two transactions went through Barton's, the other one was a small one involving 500 cases (R. 83); Tommy's Joint and the Victory Bar, with which I was identified, received some of this liquor that went through Barton's; neither I nor my places paid any overage for that liquor (R. 83); I know that some liquor went to bars that Wolcher was identified with —the Silver Rail, Gold Coast, Show Boat (R. 84);

I had nothing to do with procuring either of these shipments from the east (R. 84).

(e) Testimony of appellant Louis E. Wolcher.

Louis E. Wolcher, testifying in his own behalf, first identified his business activities and companies he owned or was interested in as above set forth, and then testified as follows:[12]

Mr. John Kirby was a friend and customer of mine for some 20 odd years (R. 347); he was an operator of coin-operated machines who had routes and locations in which he placed his (machines); he bought a lot of his equipment from me (R. 348);

Peter Norman had the same type of business and has been a customer of mine for 20 odd years (R. 348); Roy Clemens is in the same line of business and is a customer of mine (R. 348);

As to the four shipments of liquor that came through the Franciscan Distributing Company and the two that came through the George Barton Company, I did not place any order for these whiskies with the eastern shippers and did not know what distillers this whiskey was coming from until after its arrival (R. 351-2);

I contacted one Bill Gersh also known as William Gersh for the purpose of acquiring such whiskey (R. 353); William Gersh published in New York City a coin machine trade paper in which you advertised

[12]Wolcher's testimony relative to the purchase of the 500 cases Old Brook Whiskey from Rathjen's has been set forth above.

things to buy and sell, he was living on the east coast (R. 353); I knew Mr. Gersh for a good many years, prior to and up to 1943 both Mr. Gersh and I, as part of our businesses, traveled around the United States and we would meet in various parts of the country, we entertained each other when I was in the east and he was in San Francisco (R. 354);

Mr. Gersh was not, as far as I know, in the whiskey business (R. 354);

I first had a talk with Mr. Gersh about whiskey in either Chicago or New York in the spring of '43 (R. 355);[13]

As a result of my conversation with Gersh in the Spring of '43 and until the early part of 1944 I sent Mr. Gersh close to $150,000; I first sent him $5,000 in the middle of June, 1943, to get me whiskey, it was to apply to the overage that this whiskey would cost over and above its regular invoice price (R. 358); as a result the first shipment of whiskey arrived from the east through the Franciscan Company (R. 359); about the middle of August I sent Gersh $3,300 (R. 359) and about the end of August I sent him $5,000 (R. 461);

The sum of close to $150,000 I sent to Gersh in various ways: I would issue a check and buy a bank draft for it, or I would buy a bank draft for

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[13]Here appellant was asked what conversation he had with Gersh about whiskey. The Government objected on the ground it called for hearsay and self-serving testimony; the Court sustained the objection (R. 355-6). This entire matter is set forth in *Specification of Error No. 3.*

cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it either in cash or check (R. 359-360);

I then sent Gersh $12,500, and then $60,000 of which $30,000 was in cash and $30,000 in the form of a bank draft (R. 360-1); which I delivered to him in his office in New York City; this was all money to be applied against the overage of the whiskey (R. 361); Gersh and I had decided, subject to change, on how much overage I would pay to Gersh for getting the whiskey; the first arrangement was for $20 a case and that continued until I had received 2 or perhaps 3 shipments, then Gersh suggested that I pay him $25 a case (R. 361-2); none of the money I sent or gave to Gersh was used in any manner to pay the invoice price of the whiskey.

After the $60,000, I sent to Gersh by express in December or January $30,000 (R. 362).

During this period of time I received money back from Gersh; the first $5,000 I sent Gersh I drew a check on my own bank account and bought a bank draft for this $5,000 which I sent to Gersh; I received a check back from Gersh for $5,000 and it became an entry in my books; my arrangement with Gersh was, when I issued the check for $5,000 in my own books, I had to account for something or charge it to something, so I put it in as a suspense item, Bill Gersh; when he returned $5,000 by check we put it into the bank account again which cancelled out the (suspense) entry (R. 363-4);

In addition to the sums I mentioned I sent substantial amounts of money to Gersh in cash in lots of a thousand or fifteen hundred dollars at a time; of approximately $150,000 I paid to Gersh I received back $35,000 (R. 369); the understanding with Gersh as to his sending me back some money was that when I didn't have enough overceiling money to send him[14] I would send him cash from my bank account, or in case of the $30,000 check where I had borrowed money which was the same as if it came out of my account, then after I disposed of the whiskey and sent him the over-ceiling money he was to return these items I had actually taken out of my bank account so that I could balance my books—5,000 went out and 5,000 came back (R. 380); I never received any cash back from Gersh, only checks (R. 369);

(Here Wolcher identified certain checks as follows: Check of Advance Automatic Sales Co. dated June 14, 1943, payable to Bank of America for $5,000, signed by Louis E. Wolcher [Def's Ex. E, R. 370]

Draft or Cashier's Check for $30,000 issued by United States National Bank of Portland, Oregon, Nov. 3, 1943, payable to Louis E. Wolcher. Endorsed by Louis E. Wolcher and "Bill Gersh, the Cash Box". Deposited or cashed in the Corn Exchange Bank Trust Company, New York on Nov. 9, 1943 [Def's Ex. F, R. 372]

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[14]Wolcher testified that many times the outsiders buying the whiskey over the ceiling price would pay in advance, *i.e.*, before the shipment arrived (R. 364).

Bank (Cashier's) check for $12,500, issued by the Bank of America, San Francisco, Sept. 29, 1943, payable to order of Bill Gersh. Endorsed "Bill Gersh, Cash Box". Deposited or paid by The Corn Exchange Bank Trust Company, October 4, 1943. [Def's Ex. I, R. 378]

Check of the Cash Box, signed by Bill Gersh, dated New York, Aug. 13, 1943, for $5,000 payable to order of Lou Wolcher, drawn on Corn Exchange Bank Trust Co., N. Y. Endorsed by Lou Wolcher. [Def's Ex. G, R. 374.]

Check of the Cash Box, signed by Bill Gersh, dated New York, Feb. 1, 1944, payable to Advance Automatic Sales Co. for $22,750, drawn on Corn Exchange Bank Trust Co. [Def's Ex. H, R. 375.]).

(*Witness Continuing*): In addition to the foregoing I received a check for $2,000 sent and signed by Mr. Gersh's wife (R. 379) (Def's Ex. J); the only money transactions that appeared on my books were the $5,000 and the $30,000 drafts (R. 380); the check for $12,500 does not appear on my books (R. 379);

Gersh paid out some money for me to the Runyan Sales Co., Newark, N. J.; Gersh had told me that his accountant had cautioned him he had better have a reason for washing all this money through his bank and Gersh suggested that the next time I buy any equipment in the east to contact him and allow him to make the purchase for me, so that it would in some measure account for his handling all this money for me. I told Gersh I had purchased some

phonographs from the Runyan Sales Co. and that he should make the initial payment or deposit; as a result he paid the Runyan people $5,250 (R. 376-7);[15]

I kept no books as such of my dealings with Mr. Gersh, but I did keep a record at the time (R. 382); in the preparation of my income tax return for the fiscal year ending in 1944, I knew at that time I had made no taxable profit on these transactions (R. 381); figuring the cost of this liquor at the invoice price and what I had to pay to Gersh I didn't make any money on the transactions and there was no point in reporting it (R. 366); the sales made over the ceiling price so far as I knew equalled or approximately equalled the overage a case I had to pay for the use of this whiskey in my own taverns and those of my family (R. 366); I did not put the transactions in my books because the OPA was then in effect and my books would have been evidence convicting me of black market operations (R. 366).[15a]

After both sides had rested appellant moved the Court to re-open the case in order that he could

[15]Note that Wolcher sent checks totalling $47,500 and only received checks back totalling $29,750, add to this $5,250 paid by Gersh to Runyan Sales Co. and Gersh only returned to Wolcher $35,000, the exact amount of the two items that appeared on Wolcher's books.

[15a]There was no dispute that if Wolcher's testimony was true he made no profit on the whiskey transactions. A mathematical computation of the amounts he said he paid compared to the number of cases sold to outsiders over the ceiling prices, shows no taxable profit.

subpoena William Gersh as a witness to identify the transcripts of his bank account with the Corn Exchange Bank of New York. The Court denied the motion. The full proceedings in this regard are set forth in *Specification of Error No. 4.*

At the conclusion of all the evidence appellant moved for a judgment of acquittal, which motion was denied (R. 6).

The Court instructed the jury and committed error in the giving and refusal of certain instructions. *Specification of Errors Nos. 1 & 2.*

The jury returned a verdict finding defendant guilty and appended thereto the following: "The Jury recommends leniency" (R. 6).

The Court sentenced appellant to imprisonment for 2 years, to pay a fine of $10,000 and costs of prosecution (R. 19).

SPECIFICATION OF ERRORS.

Specification No. 1.

The trial Court erred in instructing the jury as follows:

> "So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and story told by the defendant in the case. If you believe his story, then you should return a verdict of not

guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty" (R. 483).

To the giving of the foregoing instruction appellant duly objected as follows:

"Then your Honor instructed the jury that in your opinion this came down to a question of believing the defendant's story, and your Honor instructed the jury that if they disbelieved the defendant's story, they should find for the Government. Well, we note an exception to that instruction. There is other evidence in the case that doesn't depend solely upon defendant's story to establish a reasonable doubt which is all the defense has to do as to any of the elements recorded here" (R. 487).

Specification No. 2.

The trial Court erred in refusing to instruct the jury as requested in Defendant's Requested Instruction No. 21, reading as follows:

"In determining whether the defendant made any profit on his purchases and sales of whiskey, you must determine from all the evidence in the case, the actual amount the defendant paid for the whiskey and the actual amount the defendant received for the whiskey; in determining what amount the defendant paid for any whiskey involved in this case, you must add to the actual cost of said whiskey, any amounts of money, if any, that Wolcher paid to any person as a bonus or commission or fee for procuring such whiskey for him" (R. 12).

To the refusal to so instruct the jury appellant duly objected as follows:

> "Now as to our requested instruction No. 21, I desire to note an exception for the following reasons. This instruction instructed the jury that in the computation of whether or not the defendant made any profit out of these whiskey transactions, that they had to consider as part of the cost of these whiskies, any monies he had to pay as the result of bonuses, commissions and so forth, if they find he had so paid any. Your Honor didn't instruct on that or give any other instruction covering the subject" (R. 490).

Specification No. 3.

The trial Court erred in sustaining objections by the Government to questions asked of appellant, on his direct examination, as follows:

> "Q. When did you first have any talk with Mr. Gersh about whiskey? About when?
>
> A. Oh, it was in the spring of '43. * * *
>
> Q. And what conversation did you have with Mr. Gersh at that time?
>
> Mr. Schnacke. If your Honor please, this obviously is an effort to get in hearsay testimony, self-serving hearsay at that, into evidence. The fact that there was a conversation I think is unobjectionable, but I will object to the details or nature of this conversation.
>
> Mr. Friedman. This man is on trial. He is entitled to tell what occurred.
>
> Mr. Schnacke. We have had hearsay all morning that I haven't objected to, but I must object at this point, your Honor.

Mr. Friedman. Well, I don't know what Mr. Schnacke thinks hearsay is.

The Court. Well, I don't see how, Mr. Friedman, the hearsay rule could be avoided. Of course the defendant can testify to anything that he did.

Mr. Friedman. Well, he did—he had a conversation.

The Court. What he may have said to some other man or some other man may have said to him is hearsay; at least it is at this stage of the proceedings.

Mr. Friedman. Of course, I am trying to present this matter in some more or less chronological order. I can turn it around and say, 'Did Mr. Gersh get you some whiskey?' 'What led up to it?' We have the same thing. He certainly has a right—your Honor will recall the opening statement of what the defense is here: That he had negotiations with Mr. Gersh. With someone. I don't know whether I mentioned Mr. Gersh in opening statement, and he had to pay overage for this whiskey.

The Court. I am not saying any factual matters are not admissible. The only question now, is that conversation that he had with the man, which wouldn't prove any fact in the matter.

Mr. Friedman. Well, it explains what happened.

The Court. If the explanation is hearsay, that doesn't make it admissible because it is an explanation.

Mr. Friedman. It isn't hearsay.

The Court. The fact——

Mr. Friedman. Could we give only half of the transaction and say, 'Did you get this whiskey?'

'What did you pay for it?' 'Well, I paid this price for it when I(t) came. I gave John Smith so much money.'

The Court. The witness can testify to what he did in that regard.

Mr. Friedman. But he is allowed to explain why he did it.

The Court. The circumstances. At this time I will sustain the objection on the ground that it is hearsay." (R. 354-6.)

Specification No. 4.

The trial Court erred in denying defendant's motion to reopen the case in order that defendant might call William Gersh as a witness, all of which fully appears from the following portions of the record:

The trial was resumed on Monday, August 31, 1953, at 10 A.M. (R. 460.) Both sides rested at about 10:30 A.M., and the trial was continued to 1 P.M. for arguments to the jury. (R. 467.) At 1 P.M. the following proceedings were had out of the presence of the jury (R. 468-472):

Mr. Friedman. If it please the Court, in this matter Your Honor will recall I attempted to identify some documents by calling Mr. Appling to the stand. I was unsuccessful in doing it. Since our adjournment I have been advised, and I don't know how true it is that Mr. William Gersh is here under subpoena for the government. If that is so, he would be the best witness to identify these documents; and if that is so, I would either like to have him produced or find out

where he is so that we can produce him in order to do so, if Your Honor please.

I may say in passing that I consider this document to be of vital interest to the defendant's case; otherwise I would not have attempted to put it in.

Mr. Schnacke. If your Honor please, Mr. Gersh, as I understand it, has been in town since last night. Mr. Gersh was advised on Friday that he was not required to be here as a government witness; nonetheless he has come to San Francisco. I have determined this by means of investigation. Mr. Gersh has not been in touch with the government. I have no way of knowing that he is here. Obviously, he was brought out by someone other than the government. He was originally subpoenaed. He was notified that he was not to appear. Nonetheless he appears to be in town.

Now this matter was known certainly to the defendant. I don't know whether Mr. Friedman knew it this morning, but I am satisfied that Mr. Wolcher or his associates knew it this morning.

The Court. I don't understand what you want me to do, Mr. Friedman. This case was submitted this morning.

Mr. Friedman. I understand that, Your Honor.

The Court. I am not going to send out at this stage because you say somebody is here in San Francisco, to send out the Marshal hunting for him. This isn't the time to do that at this stage of the case. I just don't see what the point is that you are making here.

Mr. Friedman. This point is that I have no other way of establishing these documents.

The Court. That may be also, but if you had wanted to establish the documents, you could have subpoenaed him or had him brought here. After the matter is submitted by both sides this morning, you say that information has come to you. The government says they have heard he is in town. What is there that you want me to do now?

Mr. Friedman. I am going to ask Your Honor to reopen the case to be allowed to subpoena Mr. Gersh.

The Court. I will deny the motion. There is no showing—I shouldn't be as abrupt as that, but there is no showing made of any reason for it, when the case is ready to go to argument, when there has been ample opportunity to subpoena witnesses and the case is at this late stage, that you want to go out and send a subpoena for this man.

When are you going to get him? Do you know when he can be brought in here or anything along that line? No, no, that application is not timely in any sense of the word.

Mr. Friedman. It is timely in this sense, that he is here in San Francisco.

The Court. Apparently there was ample opportunity during the weeks before this case was set for trial to arrange for the presence of the witness if you wanted him here. At this point in the case it seems to me that it would be contrary to the interests of justice to stop the case now at a point when it is ready for argument after having been adjourned at

10:30 this morning for the purpose of allowing counsel to prepare their arguments.

Mr. Friedman. I have made my presentation. May I ask one more question of Mr. Schnacke? Would you be willing to stipulate that those are the bank records of Mr. Gersh? They were introduced at the last trial; they were identified by the government.

The Court. Wasn't this man a witness at the last trial?

Mr. Friedman. For the government.

The Court. No matter who he was a witness for, he was here, and there would have been opportunity to inquire concerning this matter that you speak about concerning the bank records.

Mr. Friedman. He identified them at the last trial.

The Court. That may be so, but there is no opportunity to interrogate him concerning those records. I don't know what is in them.

Mr. Schnacke. There were a lot of matters gone into at the last trial that we have not gone into at this trial.

Mr. Friedman. That is true.

Mr. Schnacke. I don't see that contract has any connection with this case. Mr. Friedman met Mr. Gersh and knows of his connection with the case. As Your Honor says, if he had wanted him, he could have subpoenaed him to appear.

Mr. Friedman. I didn't think we would have any difficulty in establishing these documents in view of the fact they were identified at the last trial and in view of the fact that they are their documents, be-

cause the record shows that the government examined Mr. Gersh.

The Court. The statement was made on last Thursday that the defense rested, but the Court said that if there were any further questions that were to be asked of Mr. Wolcher, that the Court would not deny the right to either side to ask some question that had been overlooked, and this morning the defendant resumed the stand. He was questioned for not more than three minutes by both sides together, and then counsel sought to introduce, I assume as a part of his case although he had already rested, through a witness some document that has to do with the bank account of a witness who is not here, and when that witness couldn't identify the bank account, why, then the defendant rested.

Mr. Friedman. That is right. That is what I did.

The Court. Now that was at 10:30 this morning, and the case is now set for argument and the record now discloses the nature of your application. I can see no ground whatsoever that appeals to the Court's discretion or sense of justice that would now say that you could at this late time try to locate some witness for the purpose of presenting these documents, so I shall deny the motion. I assume the motion that I am denying is the motion that counsel just made to continue the case for the purpose of subpoenaing the witness.

Mr. Friedman. And so my record will be clear, in support of the motion may I offer and ask that there be marked for identification what was Govern-

ment's Exhibit 37 at the last trial and Defendant's Exhibit G at the last trial.

The Court. Those are documents that you are offering for identification only to show what you are referring to in your motion?

Mr. Friedman. That is right.

The Court. All right; let them be marked for identification.

The Clerk. Defendant's Exhibits O and P marked for identification.

(Whereupon the documents referred to were marked Defendant's Exhibits O and P for identification.)

The Court. Had there been a timely application, Mr. Friedman, the Court would have given time to produce this witness.

Well, I think I have said enough. Bring the jury in. We will proceed with the argument.

ARGUMENT.

Once again Louis E. Wolcher appeals to this Court on the ground that due to rulings of the trial Court and the actions of the prosecuting attorney he was denied a fair trial as guaranteed by the Constitution and prevented from presenting a full and complete defense to the charge against him.

The denial of a fair and impartial trial, as guaranteed by the Sixth Amendment, is also a denial of due process as guaranteed by the Fifth Amendment, and the failure to observe these Constitutional safe-

guards renders a trial and conviction void (*Baker v. Hudspeth* (10 Cir.), 129 F. 2d 779).

Precluding a defendant from making a full defense is a violation of the Constitutional right to a fair trial (*Atwell v. United States* (4 Cir.), 162 F. 97; *Sunderland v. United States,* 19 F. 2d 202, 216; *Estep v. United States,* 327 U.S. 114, 125, concurring opinion of Mr. Justice Murphy).

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1. THE COURT ERRED IN INSTRUCTING THE JURY THAT THE GUILT OR INNOCENCE OF APPELLANT DEPENDED ON THE TRUTH OR FALSITY OF HIS "STORY".

Specification of Error No. 1.

The trial judge, *sua sponte,* instructed the jury as follows:

> "So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty." (R. 483.)

This instruction was highly prejudicial to the rights of appellant: (a) It shifted the burden of proof from the Government to appellant; (b) it took from the

jury the question of whether the Government's evidence established the charge beyond a reasonable doubt; (c) it, in effect, told the jury to disregard all other evidence in the case save the testimony and "story" of defendant and to decide his guilt or innocence solely upon his testimony; (d) it told the jury to discount or ignore weaknesses in the Government's case if the jurors found appellant's testimony to be unworthy of belief.

This Court, on February 15, 1954, decided the case of *Olender v. United States* (.......... F. 2d ....) in which case the trial judge gave an instruction far less prejudicial than the one given herein. This Court, in an opinion by Judge Bone, held the instruction given in the *Olender* case to have been erroneous and stated:

> "The vice of the instruction in issue is that it tended to divert attention from the question whether the government evidence established these facts beyond a reasonable doubt, to the presence or absence or nature of the defendant's 'explanation'. On the basis of this instruction the jury might have discounted great weaknesses in the government's case because of the silence of the defense. While the words of the instruction did not in terms shift the burden of proof to the defendant, they well might have had that effect in the minds of the jurors. * * * it is particularly important to keep the jury's attention riveted upon the ultimate question whether the government has sustained its burden of proving the crime charged beyond a reasonable doubt. See Demetree v. United States, 5 Cir., 207 F. 2d 892;

Lurding v. United States, 6 Cir., 179 F. 2d 419, 422."

This Court, in the *Olender* case, then refers to and quotes from *Bihn v. United States,* 328 U.S. 633, as follows:

"The challenged instruction is in some ways similar to that given in Bihn v. United States, 328 U.S. 633, 637. That case involved a prosecution for conspiracy to steal ration coupons. The defense was that persons other than the defendant could have stolen the coupons. The trial judge instructed fully that the burden was upon the government to prove the crime charged, beyond a reasonable doubt, but he also instructed: 'Who would have a motive to steal them? Did she (the defendant) take these stamps? You have a right to consider that. * * * Did she steal them? Who did if she didn't? You are to decide that.' The Supreme Court held that the giving of the instruction was reversible error, saying '* * * to put the matter another way, the instruction may be read as telling the jurors that, if the petitioner by her testimony had not convinced them that some one else had stolen the ration coupons, she must have done so.' 328 U.S. at 637."

Immediately following the foregoing language in the *Bihn* case, the Supreme Court stated (328 U.S. at 637):

"So read, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused

of crime. See Quercia v. United States, 289 US 466, 469, 77 L ed 1321, 1324, 53 S Ct 698."

The case at bar is on all fours with the case of *Bihn v. United States.* Here, the complained of instruction not only "may be read as telling" but actually told the jurors that if appellant had not convinced them by his "story" that he made no profit from the whiskey transactions then he should be found guilty.

In *Ezzard v. United States,* 7 F. 2d 808, 811, it is stated:

> "In no condition of proof is it permissible to instruct a jury that it had become the duty of defendant to establish his innocence to obtain an acquittal."

There was ample evidence, without considering appellant's testimony, that would have justified the jury in finding the Government's case had not been established beyond a reasonable doubt.

The Government called representatives from three liquor wholesale and distributing houses. Oligny of the George Barton Co. testified that it was impossible for that company to get whiskey and that they could not get enough to keep in business (R. 109); Weiss of the Franciscan Co. testified that the larger distillers were decreasing allotments to such an extent that they were unable to carry on their business (R. 140); Vance Hammerly of Rathjen Bros. testified they were not receiving sufficient whiskey to supply

their customers and they had to put their customers on an allotment basis, based on the average amount a customer had bought (R. 311).

Each of the tavern owners called by the government testified that it was almost impossible to get whiskey (R. 165, 171, 176, 180, 190, 200, 209, 216, 228, 251, 260, 267).

The evidence established that Wolcher was not in the wholesale liquor business, or in the business of buying and selling whiskey in either case or carload lots. This very fact was sufficient to raise a doubt as to whether Wolcher could acquire the 7 lots of whiskey without having to pay a bonus therefor, when licensed dealers could not do so.

As to the Old Brook whiskey purchased through Salesman Worthy from Rathjen Bros., the ledger sheets of Rathjen's showed that the Gold Coast and Silver Rail taverns of Wolcher were on an allotment basis of not exceeding $600 per month; that they were on a C.O.D. basis; that in May, 1943, 500 cases of Old Brook whiskey was sold to the Gold Coast for $25,950 (R. 46) and this was not paid for on delivery but was paid off in four installments (R. 315, and Def's Ex. C & D). Hammerly also testified that Rathjen's only received one shipment of 1,000 cases of this Old Brook whiskey and 500 cases thereof were sold to the Gold Coast (R. 315). Grusenmeyer testified that when he received the money for the sales of this whiskey he deposited the Rathjen cost in the bank and put the surplus in the safe and that Wol-

cher told him the differential was because he had to pay money over the ceiling price for the whiskey (R. 68). Jack Kent, called by defendant, testified that Worthy told him that he could supply 500 cases of this whiskey but there would have to be an additional under the table price paid (R. 336) and he believed that $20 a case over the list price was mentioned by Worthy (R. 343).

As to the other transactions, Roy Clemens, who arranged many of the sales to tavern owners, testified that when he asked Wolcher if it were possible to get any whiskey for his tavern locations, that Wolcher told him "he knew where there was some available, but it was black market and the price was high * * * that he wasn't making a dime out of it" (R. 291-2).

All of the foregoing facts were sufficient to have justified the jury in finding a reasonable doubt as to the Government's proof and as to whether Wolcher, when no one else could, was able to get whiskey in large shipments without he, in turn, having to pay over the ceiling price for same. The complained of instruction took from the jury the consideration of all the foregoing matters and left appellant's guilt or innocence to be determined solely on whether the jury believed or disbelieved Wolcher's testimony.

2. THE COURT ERRED IN REFUSING TO INSTRUCT THAT IN COMPUTING THE PRICE PAID FOR THE LIQUOR THE JURY SHOULD ADD TO THE INVOICE PRICE ANY BONUS OR COMMISSION PAID BY WOLCHER.

Specification of Error No. 2.

The Court refused to instruct the jury as requested in Defendant's Requested Instruction No. 21, reading as follows (R. 12):

> "In determining whether the defendant made any profit on his purchases and sales of whiskey, you must determine from all the evidence in the case, the actual amount the defendant paid for the whiskey and the actual amount the defendant received for the whiskey; in determining what amount the defendant paid for any whiskey involved in this case, you must add to the actual cost of said whiskey, any amounts of money, if any, that Wolcher paid to any person as a bonus or commission or fee for procuring such whiskey for him."

The Court gave no other instruction covering this matter.[16]

The requested instruction correctly stated the law (*Wolcher v. United States,* 200 F. 2d 493). It was a basic and vital issue in the case. The refusal to defi-

[16]The only instruction given that smacks of the proposition is as follows: "The defendant, on the other hand, admits that the black market transactions were had by the defendant, but contends that he made no profit in connection with these transactions and that therefore he had no net income and that therefore he is not chargeable with any evasion of income taxes; that he made no profit in the matter, because he had to pay out certain monies in connection with the transactions and that therefore the net result was that he had no profit in the matter, and that therefore he is not chargeable with a violation of federal statute." (R. 483.)

nitely instruct on so vital an issue constituted prejudicial error (see *Bollenbach v. United States,* 326 U.S. 607, 614).

It was the Court's duty to instruct on all essential questions of law involved in the case (*Samuel v. United States,* 169 F. 2d 787 (9 Cir.)).

The very condition of the Government's case made it imperative that the Court instruct the jury as requested by appellant.

The Government had introduced in evidence, as a judicial admission of Wolcher, (1) an information filed in the California District Court charging the defendant Wolcher, in several counts, with having sold certain whiskey (involved in the present case) over the maximum prices established by law, and (2) the minute order showing that Wolcher plead guilty to Counts 1, 2 and 3 thereof (R. 246-7).

The Government called as a witness one Thomas E. Haywood, who testified: I am an Internal Revenue agent since 1945; prior to that I was in the United States Marine Corps, prior to that I was with the California Franchise Tax Board; I am a public accountant (R. 320-1); I was one of the revenue agents assigned to the investigation of Louis Wolcher (R. 321); the tax return (Plaintiff's Ex. 1) of Wolcher for the fiscal year ending June 30, 1944, is the return concerning which my audit and investigation was made (R. 321). None of the books (of Wolcher businesses) that I examined reflected any profit on whole-

sale liquor sales transactions (R. 325); in my opinion the tax return of Wolcher does not contain or include as net income any income derived from the wholesale of liquor, except $3,000 that is properly reported from George Barton Co. (R. 326);

In the course of my investigations I ran across evidence of these whiskey transactions; as part of my duties I computed what I considered to be the profit that Mr. Wolcher made in these transactions (R. 330); I took all the cash payments that I found Mr. Wolcher had received in these whiskey transactions as taxable income (R. 331-2); in my computations I made no allowance for any deductions except the ceiling price of the whiskey (R. 332).

Thus, the jury had before it the fact that Wolcher had been criminally accused of and plead guilty to black market operations concerning some of the very whiskey involved in the present action, and that an Internal Revenue agent and public accountant had considered and *computed all the overceiling prices collected by Wolcher as taxable income.*

In the absence of a proper instruction—that overceiling prices *paid by Wolcher* had to be considered as part of his cost—the jury could, and probably did, come to the conclusion that any money received by Wolcher over the invoice price to him constituted taxable income and, as he had not reported the same in his tax return, that he was guilty as charged.

3. THE COURT ERRED IN REFUSING TO REOPEN THE CASE TO ALLOW APPELLANT TO CALL WILLIAM GERSH AS A WITNESS.

Specification of Error No. 3.

In order to fully present the error in the Court's action in refusing to reopen the case and the misconduct of the Assistant United States Attorney relative thereto, it is necessary to set forth the matters leading up to the making of the motion.

The Government had concluded its case in chief showing the purchase of the whiskey and certain sales over the ceiling price. Appellant then testified as a witness in his own behalf, stating in substance that he paid William Gersh $20 and $25 a case for his procuring the whiskey for him. Wolcher then testified that he sent approximately $150,000 to Gersh (R. 380); that he specifically sent the following sums to Gersh in cash or by check: June 14, 1943, $5,000 by check (R. 363); August, $3300 in cash (R. 359); August, $5,000 in cash (R. 461); Sept. 29, $12,500 by check (R. 360, 378); Nov. 9, $30,000 by check and $30,000 in cash (R. 360, 372); Dec., 1943 or Jan., 1944, $30,000 in cash (R. 362). In addition Wolcher sent various sums to Gersh in cash (R. 369).

Wolcher further testified that where he had drawn checks that appeared as entries in his books (2 checks totalling $35,000) he would subsequently send Gersh the cash on the understanding that Gersh would send back a check for such amounts in order that Wolcher's books would be balanced (R. 369); that Gersh had only returned by checks $29,750 which, plus the $5,250

paid on account of phonographs, totalled the $35,000 (R. 374, 375, 380).

Following Wolcher's testimony and on Monday, Aug. 31, 1953, appellant called as a witness Richard H. Appling, the special agent, Intelligent Unit, Treasury Department, who was the agent in charge of the investigation of Wolcher's tax return (R. 464). In reply to questions Appling testified that in the course of the investigation he did not procure a copy of the bank account of William Gersh with the Corn Exchange Bank of New York (R. 465); that he could not identify a document that was the Government's Ex. 37 at the first trial, that he had never seen the document until after the conclusion of the first trial (R. 465-6).[17] Thereupon appellant asked that Mr. Schnacke (the Ass't U. S. Attorney) take the stand (R. 466). Mr. Schancke stated that he had no knowledge of the documents, that he was not present at the first trial (R. 467). On this statement appellant stated he would not call him as a witness.

Thereupon both sides rested the case (R. 467) and at 10:30 A.M. on Monday, Aug. 31, 1953, a recess was taken until 1 P.M. at which time arguments to the jury were to be presented (R. 467).

At 1 P.M. appellant moved the Court to re-open the case to permit him to subpoena William Gersh as a witness to identify the records of Gersh's bank account with the Corn Exchange Bank. The motion

[17]The document was a ledger sheet of the Corn Exchange Bank of Gersh's account.

and the proceedings thereon are fully set forth under our *Specification of Error No. 4, supra* p. 25, the material portions being as follows (italics ours):

> "Mr. Friedman. If it please the Court, in this matter your Honor will recall I attempted to identify some documents by calling Mr. Appling to the stand. I was unsuccessful in doing it. *Since our adjournment I have been advised,* and I don't know how true it is *that Mr. William Gersh is here under subpoena for the government.* If that is so, he would be the best witness to identify these documents; and if that is so, I would either like to have him produced or find out where he is so that we can produce him in order to do so, * * * I consider this document to be of vital interest to the defendant's case * * *.
>
> Mr. Schnacke. If your Honor please, Mr. *Gersh,* as I understand it, *has been in town since last night. Mr. Gersh was advised on Friday that he was not required to be here as a government witness; nonetheless he has come to San Francisco. I have determined this by means of investigation.* * * * *He was originally subpoenaed. He was notified that he was not to appear. Nonetheless he appears to be in town.* (R. 468-9) * * *
>
> The Court. I am not going to send out at this stage because you say somebody is here in San Francisco, to send out the Marshal hunting for him. This isn't the time to do that at this stage of the case. I just don't see what the point is that you are making here.
>
> Mr. Friedman. The point is that I have no other way of establishing these documents.

The Court. That may be so, but if you had wanted to establish the documents, you could have subpoenaed him or have him brought here. After the matter is submitted by both sides this morning, you say that information has come to you. The government says that they have heard he is in town. What is there that you want me to do now?

Mr. Friedman. I am going to ask your Honor to reopen the case to be allowed to subpoena Mr. Gersh.

The Court. I will deny the motion. There is no showing—I shouldn't be as abrupt as that, but there is no showing made of any reason for it, when the case is ready to go to argument, when there has been ample opportunity to subpoena witnesses and the case is at this late stage, that you want to go out and send a subpoena for this man. * * * No. No. That application is not timely in any sense of the word.

Mr. Friedman. It is timely in this sense, that he is here in San Francisco.

The Court. Apparently there was ample opportunity during the weeks before this case was set for trial to arrange for the presence of the witness if you wanted him here. At this point in the case it seems to me that it would be contrary to the interests of justice to stop the case now at a point when it is ready for argument after having been adjourned at 10:30 this morning for the purpose of allowing counsel to prepare their arguments" (R. 469-470) * * *

"Mr. Friedman. He (Gersh) identified them at the last trial. * * *

I didn't think we would have any difficulty in establishing these documents in view of the fact they were identified at the last trial and in view of the fact that they are their (the Government's) documents, because the record shows that the government examined Mr. Gersh." (R. 471) * * *

"Mr. Friedman. And so my record will be clear, in support of the motion may I offer and ask that there be marked for identification what was Government's Exhibit 37 at the last trial and Defendant's Exhibit G at the last trial.

The Court. Those are documents that you are offering for identification only to show what you are referring to in your motion?

Mr. Friedman. That is right.

The Court. All right; let them be marked for identification.

The Clerk. Defendant's Exhibits O and P marked for identification.

The Court. *Had there been a timely application, Mr. Friedman, the Court would have given time to produce this witness."* (R. 472-3.)

Before discussing the law applicable to the situation, we demonstrate how prejudicial to appellant it was not to have been able to have the two bank statements identified and admitted in evidence.

With the exception of the check for $12,500 (Def's Ex. I, R. 378) and the draft for $30,000 (Def's Ex. F, R. 372), each of which carried the endorsement of Bill Gersh and was deposited or paid by the Corn Exchange Bank, New York, *there is no other testi-*

mony in the record, except that of Wolcher, that Gersh ever received any other money from Wolcher.

Gersh was called by the government as a witness in rebuttal at the first trial of the action and admitted he had received $85,000 in cash and check from Wolcher and that these sums were deposited in his bank account; he identified and testified from his two bank statements involved herein. These statements show deposits made in his bank account on dates and in amounts that exactly coincide with and corroborate the testimony of Wolcher, viz.: June 15, $5,000; Aug. 11, $3,300; Aug. 31, $5,000; Oct. 2, $12,500; Nov. 9, $30,000 and Jan. 4, 1944, $30,000. Correlating these bank statements of deposits with Wolcher's testimony we have the following:

Wolcher's testimony re: Money paid Gersh			Deposits in Gersh's bank account	
June 14	(check)	$ 5,000	June 15,	$ 5,000
Aug.	(cash)	3,300	Aug. 11,	3,300
Aug.	(cash)	5,000	Aug. 31,	5,000
Sept. 29	(check)	12,500	Oct. 2,	12,500
Nov. 9	(check)	30,000	Nov. 9,	30,000
Nov. 9	(cash)	30,000		
Dec.	(cash)	30,000	Jan 4,	30,000
	Total	$115,800		$85,800

Of the $85,800 that thus would have been traced into Gersh's bank account, there was as we have pointed out above only $29,750 returned by check and $5,250 paid on account of the phonographs, a total of $35,000 which corresponds exactly with Wolcher's testimony that when he sent a check drawn on his

own bank account, he would later send cash so that Gersh would send a check back in order that Wolcher could balance his book entries (R. 369). The check for $12,500 was bought with cash which did not come out of Wolcher's bank account and did not appear on his books.

The entire defense was based on fact that Wolcher had sent or delivered to Gersh large sums of money as a bonus or over ceiling price for Gersh getting the whiskey for him.

The Court instructed the jury that Wolcher's guilt or innocence depended on their belief or disbelief of Wolcher's "story". Under this instruction the jury may well have found that Wolcher did not send such sums to Gersh as his testimony in this regard was uncorroborated. If the two bank statements had been identified and then admitted in evidence an entirely different situation would have been presented to the jury, Wolcher's testimony would have been corroborated in great part.

For the trial Court to have denied appellant the opportunity to subpoena Gersh and thus have the documents properly identified, constituted a gross abuse of discretion on the part of the trial judge.

Not only did the Court instruct the jury that they should find for or against Wolcher depending on whether they did or did not believe his testimony; but the Court also instructed the jury as follows:

> "The Government contends, as stated by the Government lawyer, that the defendant's account

> of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you" (R. 483).

Under the instructions of the Court the jury may well have found that Wolcher did not send such sums to Gersh as his testimony in that regard was uncorroborated and that Wolcher's "story" was untrue and therefore he was guilty.

If Wolcher had been given an opportunity to subpoena Gersh and have him identify his two bank statements, an entirely different situation would have been presented. Wolcher's testimony would have been corroborated.

The action of the Court in denying this opportunity to appellant affected his substantial rights, was and is prejudicial error and denied appellant the right to fully and fairly present his defense.

While the reopening of a case for further testimony rests in the discretion of the trial Court, a refusal to reopen under proper circumstances constitutes an abuse of discretion and prejudicial error.

> "Where it appears, on application to reopen a case to permit the introduction of further testimony, that the proposed testimony is of substantial importance to accused, the application should be granted."
>
> 23 *C.J.S.* p. 463, sec. 1055.

In *United States v. Maggio,* (3 Cir.) 126 F. 2d 155, the Government rested its case and defendants made a

motion for acquittal; thereupon the Government moved to reopen the case in order to call an additional witness; this the trial Court allowed. The Appellate Court stated:

> "We see no basis for holding that the trial judge abused his discretion in permitting the testimony of Benatre to be offered out of order. On the contrary the fact that that testimony was not available to the government until a few minutes before it was offered makes it clear that the court's action was quite proper."

In *People v. Oxnam,* 170 Cal. 211, 215; 149 Pac. 165, the California Supreme Court stated:

> "While the matter of allowing a party to reopen his case is one committed to the discretion of a trial court, if it had been made to appear to the lower court the proposed testimony was of any substantial importance to defendant, we should say that in the exercise of that discretion an opportunity should have been given to introduce it."

In *People v. Roberts,* 131 Cal. App. 376, 385; 21 Pac. 2d 449, the reopening of the case on motion of the prosecution, after all the testimony was closed, was upheld. The ground of the motion to reopen was that the prosecution did not know of the materiality of the testimony *until the previous Saturday afternoon.*

In every instance where a defendant has appealed on the ground that the Court abused its discretion in allowing the Government to reopen the case for

further testimony after all the testimony had been closed and after defense had moved for judgment of acquittal, this and other Appellate Courts have invariably held that there had been no abuse of discretion. (*McGrew v. United States,* (9 Cir.) 281 F. 809; *Burke v. United States,* (9 Cir.) 58 F. 2d 739, 741; *Horowitz v. United States,* (5 Cir.) 12 F. 2d 590; *Reining v. United States,* 167 F. 2d 362, 364; *United States v. Maggio, supra.*) Clearly, *the right of a defendant to reopen his case should at least be held equal to that of the prosecution.*

The trial judge had read the opinion of his Court rendered on the first appeal (R. 243). The Government knew of the prior opinion and what Gersh had testified to at the first trial, including his identification of the bank statements and the amounts that had been deposited in his bank. The bank statements had been produced by the Government at the first trial. The Government had subpoenaed Gersh as one of its witnesses at the second trial (R. 468-9).

The importance to defendant of the bank statements cannot be gainsaid. Gersh had been called as a witness in rebuttal at the first trial, identified the statements and disputed Wolcher's testimony as to the purpose for which the money had been sent by Wolcher to Gersh.

Wolcher did not know of the presence of Gersh in San Francisco until sometime between 10:30 A.M. and 1 P.M. of the day the motion was made to reopen. The Government stated that Gersh had only arrived

in San Francisco the previous night (R. 468). The motion to reopen was timely made. It was not until after the Government rested at 10:30 in the morning[18] that Wolcher knew that the Government was not calling Gersh as a witness.

The exact situation was recently passed upon in a civil case decided by the California Court of Appeal, *we adopt the language of that Court as our argument herein.*

In *Hayes v. Viscome,* 122 A.C.A. 167 (decided December 17, 1953) plaintiff sued for personal injuries. Shortly before trial at the request of defendants, she was examined by a Dr. Berryman. Dr. Berryman had not been called as a witness by defendants, whereupon plaintiff called one of the defendants' attorneys and asked him if he had not arranged for medical examination of Mrs. Hayes and that Dr. Berryman had made the examination. Objections were sustained to these questions. At this time defendants had closed their case and at 2:30 on Friday afternoon, plaintiff's attorneys requested a continuance until Monday in order to give them an opportunity to bring in Dr. Berryman. In support of their motion they explained that they were taken by surprise by defendants' fail-

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[18]In discussing the motion the judge erroneously stated that on the previous Wednesday the defense had rested its case (R. 471). On the previous Wednesday the Government concluded its case in chief and the case was adjourned until Thursday for the defense to start (R. 334). On Thursday the case was adjourned until Monday for the completion of the defense and for such rebuttal as the Government had to offer (R. 457-9). The defense did not rest until Monday at which time the Government also rested without offering any rebuttal testimony (R. 467).

ure to call the doctor and by the Court's ruling; that they had not placed the doctor under subpoena because they had not anticipated that it would be necessary to call him as a witness for the plaintiff. The Court refused the requested continuance upon the ground that plaintiff should have had the doctor under subpoena; that there were too many cases to permit a delay and that it would be an abuse of discretion to grant the continuance.[19]

In holding that it was an abuse of discretion to deny the continuance, the California Appellate Court at p. 172 stated:

> "The court stated to counsel that they should have known much earlier that they would have to call Dr. Berryman. They could not have known this unless they had known that defendants did not intend to call him, and to assume this would be to assume that defense counsel knew that the doctor's testimony would be adverse. *The matter arose as soon as defendants had rested their case and it was not until then that plaintiff's counsel knew that defendants would not call the doctor.* The fact that there were other cases awaiting trial did not warrant a denial of the requested continuance. A litigant is entitled to a fair share of the court's time, and may not be deprived of an opportunity to present his case fully and fairly because someone else is being inconvenienced by having to wait his turn. No lawyer can foresee or predict all the vicissitudes that will occur in the course of a contested trial, which

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[19]Note the identity of reasons in the *Hayes* case and the instant case for refusing to grant the continuance to call a witness.

often consists of unpredictable rulings of the court. *Plaintiff's attorneys were not negligent in failing to anticipate that defendants would not call Dr. Berryman. They acted promptly and their request for a continuance was reasonable.* * * * The court stated no sound reason for denying the continuance and we can discover none. Had we been in the position of the trial judge we would have considered denial of the requested continuance to be an abuse of discretion. As a reviewing court, our views are not different, and we cannot put them aside merely because the trial judge believed it would be an abuse of his discretion to grant the continuance. We must be guided by the dictates of our own judgment and experience, and we hold that plaintiff's case was prejudiced for no good reason by denial of her request of a short continuance." (Italics ours.)

The action of the prosecutor in having subpoenaed Gersh and then telling him not to appear *amounted to a suppression of evidence necessitating the granting of a new trial.*

The prosecuting attorney knew everything that Gersh had testified to at the first trial. He had subpoenaed Gersh as a witness. On Thursday, at the close of the court session when the case was being continued to the following Monday for the completion of the defense, the prosecutor stated to the Court:

"The Court. Will the Government, as the case stands now, have some rebuttal or not?

Mr. Schnacke. I am inclined to think there will be some, your Honor, * * *. I have some rebuttal witnesses, if your Honor please" (R. 455).

> "Mr. Schnacke. If your Honor please, the Government witnesses were subpoenaed for Friday, and when Mr. Friedman explained that his case would require a witness to appear on Monday, on that information I then advised all the Government witnesses that they should not appear until Monday.
>
> Mr. Friedman. May I ask if they are all local witnesses?
>
> Mr. Schnacke. I don't recall at the moment, Mr. Friedman" (R. 457-8).

At the close of Court *on Thursday, Gersh was still under subpoena by the Government.* On Monday Mr. Schnacke stated *"Mr. Gersh was advised on Friday that he was not required to be here as a Government witness"* (R. 468). On Thursday the prosecutor could not recall whether all his witnesses were local witnesses.

In other words, the prosecutor refused to state that he had a foreign witness under subpoena and excused Gersh from attending without notifying the defendant that Gersh was being excused.

In view of the foregoing matters and things, appellant had the right to rely on the assumption that Gersh would again be called as a Government rebuttal witness after appellant rested his case. (See *Hayes v. Viscome, supra*). There was no rebuttal evidence.

In *Griffin v. United States,* 182 F. 2d 990 (C.A.-D.C.), (a trial for homicide) a motion for a new trial was made on the grounds of newly discovered evidence in that after the trial the defense had discov-

ered that the victim had an open knife in his pocket and that the prosecution knew at the time of the trial that such testimony was available but neither produced it in Court nor disclosed it to the defense. The Court of Appeals reversed and remanded the cause stating on page 993 as follows:

> "However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 73 L.ed. 1314."

In the case of *In re Curtis,* 36 Fed. Supp. 408, 410, (D.C. 1941), the Court stated:

> "Of course if any action on the part of the prosecution amounts to the suppression of evidence, such would offend the constitutional guaranties of a person accused of crime."

In the case of *U. S. v. Schneiderman,* 106 Fed. Supp. 731, 739 (S.D. Cal. 1952), the Court said:

> "In all events, the Attorney-General—no less than the United States Attorney—labors in every criminal prosecution under the solemn duty *ex*

mero motu to see that 'justice shall be done'. *Cf.* Berger v. United States, 1935, 295 U.S. 78, 88-89, 55 S. Ct. 629, 633, 79 L. Ed. 1314. To that end he cannot properly withhold from the court evidence essential to proper disposition of the case, including *a fortiori* any evidence which may be material to the defense of the accused. See Canon 22, Canons of Professional Ethics, 62 A.B.A. Rep. 1112-1113 (1937)."

See also the following cases:

Berger v. United States, 295 U.S. 78, 88;
Read v. United States (8 Cir.) 42 F. 2d 636.

The prosecution, knowing that there had been some testimony given by Gersh at the first trial supporting the testimony of Wolcher, should not have excused Gersh as a witness without advising the defense of such action. The proper procedure was outlined and approved by this Court in the case of *Sullivan v. United States* (9 Cir.) 32 F. 2d 992, where the Government at the conclusion of its case announced through the U. S. Attorney that three men (convicts) were in custody in the county jail and unless the defense desired to keep them here as witnesses that they would be immediately returned to their respective penitentiaries; *that the Government was not going to use them as witnesses but they were available to the defense in the event they wanted to use them.* On an assignment of error this Court stated:

"There was no misconduct on the part of the district attorney. The witnesses were in the custody of the government, and subject to the

> order of the court, and it was quite proper that the defendant and the jury and the court should be advised of the fact that they were to be sent out of the jurisdiction of the court without appearing as witnesses in the case, unless desired by the defendant."

So here the Government knew the materiality of Gersh's testimony, had subpoenaed him as a witness, had announced that it would produce rebuttal testimony, as it had done at the first trial; all these matters justified Wolcher in believing that Gersh would again be called as a witness by the Government. When the Government promptly rested its case after the defense had closed, the defense should have been given an opportunity to produce Gersh who was then in San Francisco, having arrived the night before.

The action of the Government in these circumstances amounted to a suppression of evidence and constituted unfair tactics denying appellant a fair trial and thus preventing him from presenting a full and complete defense to the charge against him.

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4. THE COURT ERRED IN SUSTAINING OBJECTIONS TO QUESTIONS ASKED OF APPELLANT REGARDING HIS CONVERSATIONS WITH WILLIAM GERSH.

Specification of Error No. 3.

Appellant, on direct examination, testified that the shipments of liquor from the East had come to the distributing houses for him (R. 352-3), and then testified that he had contacted William Gersh for the pur-

pose of acquiring this whiskey (R. 353), that his first conversation with Gersh was held in the spring of '43 (R. 354). He was then asked "And what conversation did you have with Mr. Gersh at that time?" (The entire matter, objections of the Government, statements and ruling of the Court, etc., is set forth in our *Specification of Error No. 3, supra,* p. 23.)

The Government objected to the question on the ground that it called for self-serving hearsay testimony (R. 355).

The trial judge sustained the objection of the Government, basing his ruling on the following grounds: "Well, I don't see, how, Mr. Friedman, the hearsay rule could be avoided. Of course the defendant can testify to anything he did." (R. 355); "What he may have said to some other man or some other man may have said to him is hearsay" (R. 355).

> "The Court. I am not saying any factual matters are not admissible. The only question now, is that conversation that he had with the man, which wouldn't prove any fact in the matter.
>
> Mr. Friedman. Well, it explains what happened.
>
> The Court. If the explanation is hearsay, that doesn't make it admissible because it is an explanation.
>
> Mr. Friedman. It isn't hearsay.
>
> *   *   *   *   *   *   *
>
> The Court. The witness can testify to what he did in that regard.
>
> Mr. Friedman. But he is allowed to explain why he did it.

The Court. The circumstances. At this time I will sustain the objection on the ground that it is hearsay." (R. 356.)

Both the Court and Government counsel were mistaken as to what constitutes hearsay testimony. The conversation called for did not seek to elicit something that Gersh said he had done at some other time and place. This would have been hearsay. The conversation called for the arrangement between Wolcher and Gersh by which Gersh was to get the whiskey for Wolcher and the terms and conditions under which Gersh was to act. This was not hearsay.

In *Sparks v. United States* (6 Cir.), 241 Fed. 777, several of the defendants were charged with using the mails in furtherance of a scheme to defraud depositors and creditors of a bank. Defendants offered to show by defendant Sparks, who was a witness, that as cashier of the Chickasaw Bank he had a conference with the president of the First National Bank of Memphis as a result of which Sparks proceeded to make loans and discounts relying on this conversation, etc. The witness was permitted to testify that he had an arrangement with the corresponding bank by which the latter agreed to rediscount paper for the Chickasaw Bank when the latter needed it, but the Court refused to permit the conversation to be stated. The Court of Appeals at page 791 held as follows:

"Proof of the actual conversation, so far as it bore directly upon the claimed arrangement, was

not hearsay. It was the best evidence of the claimed agreement—pertinent to one of the main issues in the case. The bare statement of the witness that Omberg had said that they 'would help us in case my loans became too heavy,' and that the correspondent bank 'agreed to rediscount' (paper) for him 'if it became necessary,' *was a mere conclusion of the witness, and would not necessarily have the full probative effect of testimony of the actual statements made by Omberg, who was not present at the trial, and apparently not in the state at the time. We think defendants had the right to have the conversation given as it occurred, and thus the benefit of whatever persuasiveness of truth the actual language might carry.*" (Italics ours.)

It was Wolcher's sworn testimony that he paid Gersh $20 to $25 a case for procuring the whiskey. Wolcher was not restricted to a mere statement that as a result of the conversation he received some whiskey and sent Gersh some money. He was entitled to tell the jury in complete detail his entire dealings with Gersh. As said in the *Sparks* case, *supra,* defendant "had the right to have the conversation given as it occurred and thus the benefit of whatever persuasiveness of truth the actual language might carry".

The crime with which Wolcher was charged involved criminal intent. He had the absolute right to introduce any evidence tending to rebut an evil intent including the conversations with third persons or statements made by them tending to support his testimony.

In the case of *Haigler v. United States* (10 Cir.), 172 F. 2d 986, the Court states as follows:

> "We have said that where, as here, motive or bad purpose is an essential element of the offense charged, the accused may not only directly testify that he had no such motive or purpose, but he may, within rational rights, buttress such statement with testimony or relevant circumstances, *including conversations had with third persons or statements made by them, tending to support his statement.* * * *" (Italics ours.)

In *Cooper v. United States* (8 Cir.), 9 F. 2d 216, the Court said:

> "The defendants were entitled to show anything that might have a tendency to demonstrate, however slight such demonstration might be, that they were honest and not dishonest persons in their dealings with the government."

Appellant was denied a fair trial. He was prevented from presenting a full and complete defense. The Court committed prejudicial error in its rulings and instructions to the jury, both given and refused. The judgment and conviction should be reversed.

Dated, San Francisco, California,
March 10, 1954.

Respectfully submitted,

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